



December 11, 2000

Mr. John Greene
Assistant City Attorney
City of Austin-Law Department
P.O. Box 1546
Austin, Texas 78767-1546

OR2000-4664

Dear Mr. Greene:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 142037.

The City of Austin (the "city") received four letters requesting information which relates to the city's drainage and transportation fees. Each letter lists multiple categories of requested information. You claim that portions of the requested information are excepted from disclosure under sections 552.103, 552.106, 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

The first letter lists nine categories of information. The city indicates that it will release part of the information responsive to item 1 and all of the information responsive to items 2, 3, 4, and 5. The city also indicates that the requestor has narrowed the scope of the information responsive to items 7, 8, and 9, and that the city will release all of the information responsive to items 7 and 8 as clarified and a portion of the information responsive to item 9 as clarified. The city raises exceptions to disclosure for information that is responsive to items 1, 6, and 9 of the first request letter.

Item 1 of the first request letter reads:

Any documents provided to any past, or present member of the City Council, or their staff, or prepared for any presentation, whether used or not, to any such person, either individually, in subcommittee or in Council Session, for agenda item numbers 79, 80, 81 (and any resulting ordinances) from the June 8, 2000 Austin City Council meeting and agenda items 33, 62, and 64 (and any resulting ordinances) from the April 13, 2000 Austin City Council meeting.

The city contends that some of the information responsive to this item is excepted from disclosure by sections 552.106, 552.107 or 552.111 of the Government Code.

Item 6 of the first request letter reads:

Any documents that relate in any way to the discussion of possible or actual methods of implementation interpretation methodologies, etc., under consideration, or to be implemented, to comply with the ordinance resulting from agenda item 81 in the June 8, 2000 Austin City Council Meeting. This includes any records or documents that define "certain customers" as worded in that agenda item/ordinance or indicate which customers meet the criteria or are defined as "certain customers" as worded in that agenda item/ordinance.

Item 9 of the first request letter reads:

Any documents referring to or in any way discussing Mr. Scott Henson, prepared by any member of City Council, City Staff, or City utility staff within the last year.

The second request letter contains two items. The city raises no objection to disclosure of information responsive to item 2. Item one reads:

All documents received from any City of Austin Utility customer or developed by any City of Austin personnel, which have been used as the basis for any modifications to the monthly charges for the transportation User Fee to any City of Austin Utility customer.

The third request letter asks for

[a]ny and all information, prepared or collected since October 1991, recorded on paper or on electronic media, including but not limited to, files, memoranda, calculations, reports or any other records or documents, which relate to any inquiry, review, audit or other investigation, whether by City Auditors or other City Personnel, which address the procedures for the billings, or the billings, for the Transportation User Fees and/or the Comprehensive Drainage Fees by the City of Austin to commercial and/or residential accounts.

The fourth letter requests two items. Item one reads:

[a]ny and all records or documents, including but not limited to, memoranda, notes, letter, forms guidelines, rules, regulations, policy, procedures, instructions, training materials, example entries or any other information which has been or is currently used to outline, document, instruct, or form the basis for, the administration and/or implementation of the billing of the Transportation User Fee and/or Comprehensive Drainage Fee. The period covered should include from January 1990 to present.

Item two reads:

[a]ny records or documents that would lead tot he determination of the date or approximate date the document titled "the Administrative Rules and Procedures for the comprehensive Drainage Fee" and/or "Comprehensive Drainage Fee Billing Rules" was created.

Section 552.103(a), "the "litigation exception" excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. To secure the protection of section 552.103(a), a governmental body has the burden of providing relevant facts and documents to show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). Further, to be excepted under section 552.103, the information must relate to litigation that is pending or reasonably anticipated on the date that the information was requested. Gov't Code § 552.103(c). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture; the mere chance of litigation will not establish the litigation exception. Open Records Decision No. 452 at 4 (1986) Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* This office has concluded that litigation was reasonably anticipated when the following facts have been alleged or shown: the potential adversary filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); the potential adversary hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); the governmental body received a claim letter that it represents to this office to be in compliance with notice requirements of Texas Tort Claims Act, Civ. Prac. & Rem. Code ch. 101, or applicable municipal ordinance, *see* Open Records Decision No. 288 (1981) and Open Records Decision No. 638 (1996).

Here, the city asserts "[t]he documents as a whole relate to potential litigation on the Drainage and Transportation fees because the documents reflect the City's billing practices regarding the fees and the City's efforts to modify the practices." Thus, the city has invoked section 552.103 for all of the responsive information. The city notes that the requestor is an agent who represents parties which are administratively appealing the subject fees. The city also notes that a lawsuit involving these issues was previously litigated, without resolving the issues, by the requestor's attorney.

We conclude that the city has established by the totality of circumstances that litigation was reasonably anticipated at the time that the request was received. From our review of the submitted materials, we also conclude that this information relates to the anticipated litigation. Therefore, responsive information may be withheld under section 552.103 of the Government Code. Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed.

Further, the submitted materials include information which may not be excepted from disclosure under any of Public Information Act's permissive exceptions to disclosure. The 76th Legislature amended section 552.022 of the Government Code to provide several categories of information that are not excepted from required disclosure unless they "are expressly confidential under other law." In pertinent part this section provides:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

- (15) information regarded as open to the public under an agency's policies;

The submitted materials include a video-tape of a public meeting of the city council. This information is made public under the city's policies. This information is not made confidential by "other law," therefore, this tape must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Jay Burns", with a stylized flourish at the end.

Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/er

Ref: ID# 142037

Encl: Submitted documents

cc: Mr. W.H. "Chip" Morea, III
6112 Anemone Cove
Austin, Texas 78759
(w/o enclosures)